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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 556 16

EMILIO D'ARIA and JAMES LEO MASSI,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Emilio D'Aria and James Leo Massi, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 2nd day of October, 1959 affirming judgments of conviction of the petitioners in the United States District Court for the Southern District of New York, dated July 31, 1958.

Opinion Below

The opinion of the United States Court of Appeals which affirmed by a divided Court (Hand, Circuit Judge, dissenting) the judgments of conviction of the petitioners

entered in the United States District Court for the Southern District of New York is not yet officially reported, ... F. 2d ...., United States Court of Appeals, Second Circuit Opinions, October Term, 1958, #206, Page 2147. A copy of this opinion accompanies this petition under a separate cover.

The aforementioned opinion of the United States Court of Appeals and the judgment of affirmance based thereon, were dated and entered the 2nd day of October, 1959, and affirmed judgments of the United States District Court for the Southern District of New York, adjudging the petitioners to be guilty on Count "1" of the Indictment herein, which charged petitioners and others with receiving, concealing and facilitating the transportation, concealment and sale of narcotics in violation of Sections 173 and 174 of Title 21 of the United States Code, and on Count "5", which charged petitioners with others of the crime of conspiracy to violate the Narcotics Laws of the United States in violation of Sections 173 and 174 of Title 21, United States Code. Both petitioners were sentenced to terms of imprisonment for a period of 10 years on said Counts "1" and "5", the said sentences to run concurrently.

At the time that the District Court found petitioners guilty as charged in the indictment, the District Court rendered a decision, which decision is appended hereto and marked Exhibit A.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit, which is sought to be reviewed herein was made and entered October 2, 1959. This judgment of affirmance affirmed the judgments of conviction in the United States District Court for the Southern District of New York, which adjudged the petitioners

herein guilty on Count "1" (receiving, concealing, selling and facilitating the transportation, concealment and sale of narcotics, in violation of Title 21, Sections 173 and 174 of the United States Code) and Count "5" (conspiracy to violate the Narcotics Laws of the United States, Sections 174 and 175 of Title 21, United States Code), and whereon the petitioners were sentenced to terms of 10 years imprisonment on Counts "1" and "5", the said sentences to run concurrently.

The jurisdiction of the United States District Court for the Southern District of New York, was invoked in view of the fact that the crimes charged were violations of the Federal Laws allegedly committed within the Southern District of New York. The particular statutes involved are Sections 173 and 174 of Title 21, United States Code.

A petition for a rehearing of the appeal herein was made by these petitioners to the United States Court of Appeals for the Second Circuit on the 14th day of October, 1959. The petitioners based said petition for a rehearing of the appeal which petition limited itself to Count "5" (conspiracy count) on the ground that the Court of Appeals in its opinion acknowledged that the evidence as to the petitioners herein dealt with only one single transaction, to wit: a transaction that allegedly took place on October 21, 1957 and that therefore on the basis of said Court's decision in *United States* v. *Stromberg*, 268 Fed. 2nd, 256 (U.S.C.A. 2nd, decided June 15, 1959) there was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. The said petition for a rehearing was denied on or about the 22nd day of October, 1959.

An application was made thereafter to a Justice of the Supreme Court for an order granting the petitioners a thirty day extension of time within which to file a petition for a writ of certiorari. This application was granted by

Mr. Justice Harlan on the 29th day of October, 1959, and petitioners' time within which to petition for a writ of certiorari was extended up to and including the 1st day of December, 1959.

The jurisdiction of this court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U.S.C., Section 1254 (1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

Certiorari is sought on the grounds that the United States Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal law in conflict with applicable decisions and controlling case law; has decided an important question of Federal law which should be clarified and made more definite and certain by this Court; has decided Federal questions of substance not theretofore determined by this Court; and/or has decided said question in a way probably not in accord with the applicable decisions of this Court and with other Circuits.

Questions Presented for Review

(1) Does the doctrine of constructive possession apply to Section 174 of Title 21 of the United States Code so as to shift the burden of proof on to an accused "to explain the possession to the satisfaction of the jury"?

(2) If it is found that the doctrine of constructive possession applies to Section 174 of Title 21 of the United States Code, so as to shift the burden on to an accused "to explain the possession to the satisfaction of a jury" is said Section unconstitutional in that it shifts the burden of proof and creates a presumption of guilt and the accused must prove his innocence, not the Government his guilt

beyond a reasonable doubt and said statute is therefore unconstitutional as depriving the accused of liberty, without due process of law in violation of his rights under the Fifth Amendment?

(3) Was the proof of one single transaction that was alleged to have taken place on October 21, 1957, sufficient proof upon which to bottom an inference of continuing participation of the petitioners in a conspiracy to violate the Narcotics Laws of the United States?

Statutory Provisions in Point

Title 21, United States Code:

"Sec. 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported. * * * "

"Sec. 174. *Same; penalty; evidence*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in

any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition may be fined not more than $20,000.

Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. * * * ".

Concise Statement of the Case

The Government's Case Against Petitioners D'Aria and Massi

DAVID W. COSTA, a narcotics agent, testifying on behalf of the Government stated that on October 21, 1957 at approximately 7:20 p.m. he together with fellow narcotics agent Moynihan had defendants Casella and Santore, who were with another narcotics agent named Marshall, under surveillance (29a, R. 487).* Later Costa had a conversation with narcotics agent Doyle and after this conversation he entered the Paddock Bar on Broadway between 50th and

* Numbers followed by suffix "a" refer to pages of the Appendix to brief of petitioners D'Aria and Massi on appeal to the Court of Appeals for the Second Circuit.

Numbers preceded by letter "R" refer to the record on appeal.

51st Streets. Costa testified that the defendant Casella was alone at the bar at the time he entered and that he, agent Costa, sat down at the bar approximately three feet away from defendant Casella (30a, R. 489); shortly thereafter, agent Costa testified, an elderly man came in and spoke to Casella and that after this elderly man left and at about 10 minutes to 8, the petitioners D'Aria and Massi, whom incidentally as agent Costa testified he had never previously seen joined Casella (41a, R. 546, 47a, R. 584); Costa further stated that petitioner Massi stood at the bar between him and the defendant Casella, and that the petitioner D'Aria stood a little away from the bar between the defendant Casella and the petitioner Massi; that he (agent Costa) at the time was practically touching the petitioner Massi (31a, R. 491). After testimony as to the nature of the drinks that were ordered, agent Costa testified to an overheard conversation which the Government relies upon mainly if not solely to link both petitioners D'Aria and Massi to the conspiracy charged in Count "FIVE" of the indictment and to prove their complicity in Count "ONE" of the indictment.

The testimony as to that conversation is as follows:

"*By Mr. Walsh*:

"Q. Please continue, Agent Costa. A. The bartender—Massi, I believe, then said, 'Scotch,' and I don't recall what D'Aria said, and the bartender walked over and placed three drinks on the bar before the three men (34a, R. 494).

* * * * *

"The Court: Give them the conversation.

A. Casella then said, 'I don't have the money. One of them got sick and his partner came alone' (35a, R. 495).

"*By Mr. Walsh*:

"Q. What did D'Aria then ask Casella? A. D'Aria then asked Casella, 'Where is the package now?' to which Casella replied, 'It's in the trunk of their car on the East Side. They're good for the money.'

Mr. Stim: It's what?

The Witness: 'It's in the trunk of their car on the East Side. They're good for the money.'

Q. What else was said at this time, if anything? A. James Massi then stated to Casella, 'I don't know.'

Casella then replied, 'Look, they're going to give me the money tomorrow. You come down on Wednesday and you'll get your money.'

Massi then said, 'Are you sure?' to which Casella replied, 'I tell you I know them; they're good for the money. You come down on Wednesday and be our guests.'

Mr. Stim: What is the last one?

The Witness: 'You come down on Wednesday and be our guests.'

(500) A. (Continuing) Massi then stated——

Mr. Fusco: Who was it that stated that?

The Witness: Massi.

A. (Continuing)—'I don't want to hang around,' to which Casella replied, 'You don't have to wait. Once you get your money, you can do as you please.'

Q. After Casella had made that statement, was there any further conversation? A. Yes. Massi said, 'When I come down I'd like to see so-and-so,' I didn't catch the name that he mentioned, to which Casella replied, 'I'll see if I can let him know that you're coming.'

At this point I left the bar" (38a *et seq.*, R. 499 *et seq.*).

Agent Costa also testified that he then followed both petitioners on a round of night clubs which ended about 4:30 a.m. (40a, R. 503).

DANIEL D. MOYNIHAN, a fellow narcotics agent, testified that on October 21, 1957 at about 7:45 p. m. he maintained surveillance on the Paddock Bar on 50th Street (58a, R. 678); that he saw Agent Costa at the bar with the defendant Casella and the petitioners D'Aria and Massi (58a, R. 679) and that he merely maintained this surveillance for a number of seconds (60a, R. 682). Agent Moynihan did not testify as to overhearing any conversations or as to any criminal acts on the part of the appellants.

After the Government finished its case the petitioners, D'Aria and Massi, by their respective counsel moved for dismissal of the indictment on the grounds that the Government failed to prove a prima facie case* (60a, R. 1260 *et seq.*, 68a, R. 1313, *et seq.*). *These motions were denied* (68a, R. 1271, 72a, R. 1318).

Defense Witnesses

JAMES SANTORE, a co-defendant with the petitioners on the trial herein testified in his own defense (76a, R. 1323). Santore testified that he knew petitioner D'Aria on sight, not socially. Santore testified that prior to his meeting D'Aria on October 21, 1957, he had only seen D'Aria once before at the petitioner Massi's office (78a, R. 1387) where Massi conducted a recording business and the conversation at the time concerned a recording session to be made by Singer Tony Franco (81a, R. 1431 *et seq.*) and that the only other time he saw the petitioners D'Aria and Massi

*At the trial the petitioner D'Aria was represented by Otto F. Fusco, Esq. and the petitioner Massi was represented by the firm of Curran, Mahoney, Cohn & Stim, Menahem Stim, Esq., Trial Counsel.

was on October 23, 1957 in Philadelphia (80a, R. 1421); Santore testified that he does not know petitioners D'Aria and Massi (81a, R. 1431, R. 1432) and that the aforementioned times were the only times he saw the petitioners. Santore further testified that on the night of October 21, 1957 he met Peter Casella, a co-defendant, the two petitioners, D'Aria and Massi, and a lady friend in front of the Paddock Bar and that they went to several night-clubs (80a, R. 1421, 83a, *et seq.*, R. 1437 *et seq.*).

James L. Massi, one of the petitioners herein took the stand in his own defense. He denied guilt of the crimes charged (101a, R. 1667). Massi testified that he was connected with Pic Records since 1954 or 1955 as a distributor and salesman of records (86a, R. 1640); that he did not know and had never met co-defendants Ignazio Lawrence Orlando, Joseph Paul Lo Piccolo, Anthony Edward Tarlentino, Nicholas Narducci, Anthony Napolitano, Nicholas Tolentino and Lorenzo Orlando (102a, R. 1668); that he first met the co-defendant Santore during the month of October, 1957 when Santore together with co-defendant Casella and singer Tony Franco* visited his office at Pic Records to discuss a recording session for Tony Franco (86a, R. 1641) that his conversation at the time was with co-defendant Casella and that defendant Santore merely accompanied Casella.

Massi further testified that he first met co-defendant Casella in 1956 at the office of Pic Records where a discussion was being held concerning a recording session for singer Tony Franco, who was being managed by Casella's brother and in whom co-defendant Casella appears to have had an interest (87a, R. 1643); that he knew the petitioner D'Aria and D'Aria's family for over 20 years (90a, R.

* Tony Franco testified as a defense witness on behalf of the petitioners D'Aria and Massi and corroborated their testimony [R. 1608 *et seq.*].

1647) and that on the evening of October 21, 1957, he had an appointment to meet Peter Casella at the Paddock Bar (89a, R. 1646) and that because his (Massi's) car was not in running condition, he asked D'Aria to drive him to the Paddock Bar (90a, R. 1646). Massi further testified that he and D'Aria walked into the Paddock Bar at about 8:00 p. m. and that the co-defendant Casella came in about 10 minutes later (91a, R. 1649) and sat down with them; that the fighter Tony Canzonari came up and was introduced and that afterwards petitioner Massi and defendant Casella discussed the recording session of Tony Franco and how much it would cost (92a, R. 1650); that afterwards they left the Paddock Bar and met co-defendant Santore and Santore's girl friend outside and then went to various night clubs (92a, R. 1651).

Massi denied the conversation with Casella as testified to by narcotics agent Costa (92a, R. 1651).

Massi further testified that two days later he went to Philadelphia to discuss the recording session of Tony Franco with the brother of co-defendant Casella who was Franco's agent (94a, R. 1655) and that petitioner D'Aria came along to drive Massi because Massi's car was still not in running condition (95a, R. 1655).

Emilio D'Aria, the other petitioner herein testified in his own defense. D'Aria testified that he knew petitioner Massi for over 20 years and that except for the co-defendants Casella and Santore he did not know any of the other co-defendants nor knew what they looked like prior to the trial of this action (109a, R. 1725); that he first met the co-defendant Casella during the year 1956 at the wake of his (D'Aria) brother-in-law and that the only other time prior to October 21st that he had seen Casella was at the Pic Recording Co. where he met co-defendant Santore (108a, R. 1724); that he had met the defendant Santore

for the first time prior to October 21, 1957 at the Pic Recording Co. where Santore accompanied co-defendant Casella (108a, R. 1723).

D'Aria further testified that on the evening of October 21, 1957 Massi met him in a bar in the Bronx and that Massi asked him (D'Aria) to drive him downtown to meet co-defendant Casella (112a, R. 1731); that he and Massi started downtown from the Bronx at 7:30 p. m. (113a, R. 1733) and that they entered the Paddock Bar at about 8:00 p.m.; that about 20 minutes later co-defendant Casella came in and that Casella and Massi spoke to each other about the cost of making a recording session for the singer Tony Franco (113a, R. 1735).

D'Aria denied the conversation testified to by agent Costa or that any of the parties discussed narcotics (114a, R. 1735, R. 1736). D'Aria further testified that while at the Paddock Bar the fighter Tony Canzonari came over to their table and was introduced and that later the parties left the Paddock Bar and went to several night clubs and restaurants in which places the Tony Franco recording session was discussed (114a, *et seq.*, R. 1737, *et seq.*). D'Aria also admitted going to Philadelphia several days later with petitioner Massi as testified to by Massi.

At the conclusion of the entire case petitioners D'Aria and Massi by their respective counsel moved for judgment of acquittal on the grounds that the Government failed to prove their guilt as to the counts charged against them in the indictment beyond a reasonable doubt (115a, *et seq.*, R. 1796 *et seq.*, 124a, *et seq.*, R. 1809 *et seq.*). *These motions were denied* (124a, R. 1808a) *and the petitioners were found guilty of all the counts set forth against them in the indictment* (130a, R. 1831).

Reasons Relied on for the Allowance for the Writ of Certiorari

---

POINT I

The term, "constructive possession" does not constitute the "possession" set forth in the last paragraph of Section 174 of Title 21, United States Code, so as to shift the burden of proof to the defendant to explain said "constructive possession" to the satisfaction of the jury.

At the trial, neither of the petitioners were shown to have been in actual possession of the narcotics involved. Both the Government, the Trial and Appellate Court adopted the doctrine of "constructive possession" to bring into operation the statutory presumption set forth in the last paragraph of Section 174 of Title 21, United States Code. Apparently the Court below confused the term "possession" as used in the Statute with the term ownership or partial ownership, that it thought was proven on the trial.

In *United States* v. *Landry*, 257 Fed. 2nd, 425, the United States Court of Appeals for the Seventh Circuit, in a recent decision dated July 30, 1958, disagreed with the majority opinion in this present appeal with regard to the doctrine of constructive possession bringing into operation the statutory presumption provided for in Section 174, Title 21 of the United States Code. In the *Landry* case, the Court stated at page 431, as follows:

> "(5) There can be no doubt that actual possession was in Dolores, not Landry. The government appears to so recognize because it states in its brief

that a finding of possession in Landry could not be sustained absent his admission of ownership. The government informs us that no case has been found in which the precise question has been decided. We suspect the reason for this is that this is the first time the government has advanced the novel idea that ownership of narcotics is proof of their possession. Ownership and possession of a thing,' of course, may merge in the same person but, on the other hand, ownership may be in one person and possession in another. Assuming, as we think proper, that Congress employed the word 'possession' in its ordinary and usual connotation, it certainly means something different from 'ownership.' Ownership is not proof of possession any more than possession is proof of ownership. If Congress had intended that a presumption arise against the owner as well as the possessor of a narcotic, it would have so declared. The same can be said of constructive possession or the unexercised right of possession."

* * *

It is quite obvious that the reasoning of the *Landry* case is equally applicable to the case of the petitioners herein.

Judge Learned Hand in his dissenting opinion in the present appeal in the Second Circuit (see pp. 37a to 39a of opinion of Court of Appeals, accompanying this petition under separate cover), cited the *Landry* case with approval and agreed with the rationale of its decision. Judge Hand in his dissenting opinion put forth a most persuasive and eloquent argument on behalf of the petitioners which certainly raises special questions for this Court to review on certiorari.

POINT II

The proof as against the petitioners Emilio D'Aria and James Leo Massi was limited to one single isolated transaction and is an insufficient basis upon which to base an inference of continuing participation in a conspiracy.

A reading of the decision of the Court of Appeals shows that said Court in reviewing the evidence with regard to the petitioners, Emilio D'Aria and James Leo Massi, in pages 18a and 19a of the opinion under separate cover and accompanying this petition hereinbefore referred to, dealt with one single transaction that allegedly took place on October 21, 1957. It is quite apparent from a reading of the opinion that the said Court in deciding the appeal disregarded controlling Case Law in said Circuit as enunciated in *United States* v. *Stromberg*, 268 Fed. 2nd 256 (U. S. C. A. 2nd, decided June 15, 1959), wherein said Court of Appeals in reversing a conviction of the appellant, Saul Snyder, for conspiracy to violate the Narcotics Laws of the United States, restated the one transaction doctrine that had previously been obiter as follows at page 267:

> "We also think that the conviction of the appellant Snyder must be reversed. At the trial, it was stipulated that Snyder had been introduced to either Aron or Baruche in 1949, before the conspiracy began. Aside from this, which standing alone was insufficient to support a conviction, the only incident connecting Snyder with the conspiracy is the delivery of two suitcases, later found to contain heroin, to Vellucci and Ewing in Hoboken. In United States v. Reina, 2 Cir., 242 F. 2d 302, certiorari denied *sub*

> *nom* Moccio v. United States, 354 U. S. 913, 77 S. Ct. 1294, 1 L. Ed. 2d 1427 we held that participation in a single isolated transaction was an insufficient basis upon which to bottom an inference of continuing participation in a conspiracy. For aught that appears in this record, this was Snyder's only transaction with the group; under the reasoning of the Reina case, the evidence is insufficient to support the inference that Snyder knew or accepted the conspiratorial aims or that his participation went beyond the single transaction."

(See also *United States* v. *Reina*, 242 F. 2d 302, U. S. C. A. 2d 1957.)

Nowhere in the record is there any proof of the petitioners' connection with any of the other transactions proven at the trial nor was there any contention by the Government that they were involved in these other transactions. The Government's proof as to petitioners D'Aria and Massi is limited to October 21.

It appears quite obvious that the Court of Appeals in its opinion affirming the conviction of petitioners was either not aware of or it overlooked the controlling case law of said Circuit as hereinbefore enunciated.

CONCLUSION

The petition for certiorari should be granted and this Court in the exercise of its powers should order the judgments of conviction of the petitioners herein reversed and the matter remanded to the appropriate Court to be dealt with accordingly.

Respectfully submitted,

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Exhibit A

The Court: I want at the outset to say that I feel that I owe a debt of gratitude to the counsel in the case for their helpfulness, for their lawyerlike qualities, and also for their understanding and cooperation.

In reaching the conclusions I have reached I have reviewed all of the evidence as a whole and drawn all inferences that I think are fair and proper and that may be drawn from the testimony and exhibits that were adduced.

So having as I say carefully considered all of the evidence I find, and I am excluding Mr. Lo Piccolo for the time being, because I will give his counsel the chance he asks for if he appears within the allotted time, that all of the other defendants are guilty as charged.

And where there has been a conflict in testimony between any agent or narcotic agents and those defendants who saw fit to testify, I have resolved that conflict in favor of the agents, a particular instance of that being a conversation at the Paddock Bar which Mr. Costa testified to and which was denied by one of the defendants.

I have observed all of the witnesses who testified, including the agents and those defendants who took the stand, and I feel that the question of credibility should and must be resolved in favor of the agents. I think that from their conduct and bearing they would impress anyone with their credibility and the apparent truthfulness of their testimony.

I hold that all of the defendants were involved in one conspiracy. In view of the kind of operation and the nature of the product within this conspiracy, I feel that the case of United States v. Bruno, 105, Fed. 2d, 921, provides a guide. Thus it is not necessary that each defendant know the others or the existence of the others in the

conspiracy, that knowledge being implied from the size and the character of the conspiracy. But if two separate conspiracies should be vaguely found or inferred, one involving Narducci, Tarlentino, Ignazio Lawrence Orlando, Lorenzo Orlando, Joseph Lo Piccolo, plus the two fugitives, and the other consisting of Ignazio Lawrence Orlando, Joseph Lo Piccolo, Lorenzo Orlando, Peter Casella, James Santore, James Leo Massi and Emilio D'Aria, it is my finding that the evidence against these defendants is sufficient to find them guilty, considering against each only the statements of the conspirators involved and the evidence adduced by the Governments as to such conspirators.

Where the defendants have presented evidence on their own behalf, I find them guilty without applying any such evidence as against any other defendant, and as to the others I find them guilty on the basis of the Government's proof in the case alone.

I therefore find Peter Casella Guilty on Counts 1, 2, 3 and 5 of the indictment;

James Santore guilty of Counts 1, 2, 3 and 5;

Emilio D'Aria guilty on Counts 1 and 5;

James Leo Massi guilty on Counts 1 and 5;

Ignazio Lawrence Orlando guilty on Counts 2, 4 and 5;

Lorenzo Orlando guilty on Count 5.

I am leaving out Mr. Lo Piccolo for the time being.

Anthony Edward Tarlentino guilty on Counts 4 and 5;

Nicholas Narducci guilty on Counts 4 and 5.

Now, what about fixing a date for sentence and having a pre-sentence report?

* * * * *

PETITIONERS' REPLY BRIEF

FILE COPY

Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

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Petitioners

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UNITED STATES OF AMERICA

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Statement

This reply brief is being submitted on behalf of the petitioners Emilio D'Aria and James Leo Massi requesting that the Supreme Court of the United States delay its decision on said petitions pending the decision of the United States Court of Appeals for the Second Circuit on a reargument of said appeal which resulted in the judgment of affirmance of said United States Court of Appeals for the Second Circuit entered on the 2nd day of October, 1959, which is sought to be reviewed by the petitions for a writ of certiorari herein.

The original opinion of the United States Court of Appeals which affirmed by a divided Court (Hand, Circuit Judge, dissenting) is not yet officially reported, — F. 2d — United States Court of Appeals, Second Circuit Opinions, October Term, 1958, #206, Page 2147. A copy of said opinion accompanied the petition for certiorari under separate cover.

A petition by these petitioners for rehearing of the appeal in the United States Court of Appeals for the Second Circuit was made on the 14th day of October, 1959. Said petition for rehearing was denied on or about the 22nd day of October, 1959.

Thereafter these petitioners were informed that the Government filed a petition for rehearing *en banc* on the 16th day of October, 1959, seeking a reargument on the aforementioned appeal as to the defendants Anthony Edward Tarlentino and Nicholas Narducci, whose convictions were reversed by said Court of Appeals, and as to the defendants James Santore and Joseph Paul LoPiccolo, whose convictions were reversed as to Count #2.

Thereafter and several weeks after it had denied petitioners' application for reargument said Court of Appeals ordered all of the parties including the petitioners herein to file briefs with regard to the Government's petition for reargument. On or about the 9th day of March, 1960 the United States Court of Appeals for the Second Circuit granted the aforementioned application for rehearing *en banc*. Said rehearing was ordered as requested by the Government as to the appellants James Santore, Joseph Paul LoPiccolo, Anthony Edward Tarlentino and Nicholas Narducci. The order for a rehearing in addition included the

petitioners Emilio D'Aria, James Leo Massi and the co-appellant Peter Casella. Said rehearing *en banc* was denied as to the defendant Lorenzo Orlando. Another defendant, Ignazio Orlando, discontinued his appeal. A copy of said order of the United States Court of Appeals is hereto annexed as an exhibit.

On the 16th day of March, 1960 the argument on the rehearing *en banc* as ordered by the order of March 9, 1960 took place and all interested parties were heard. To date there has been no decision on said rehearing.

On or about May 19, 1960 the Solicitor General filed his brief in opposition to these petitions with the Supreme Court of the United States.

In view of the fact that the petitioners' rights may be substantially affected by a premature decision by the Supreme Court of the United States in passing upon the questions of law that the United States Court of Appeals for the Second Circuit has decided to reconsider, it is respectfully requested that the Supreme Court of the United States delay rendering a decision on the petitions for certiorari herein until the United States Court of Appeals for the Second Circuit renders a decision on the rehearing *en banc*.

CONCLUSION

This Court should delay rendering a decision upon the petitions for certiorari herein until the United States Court of Appeals for the Second Circuit has rendered a decision on the rehearing *en banc*.

Respectfully submitted,

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Exhibit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES SANTORE, PETER CASELLA, EMILIO D'ARIA, JAMES LEO MASSI, JOSEPH PAUL LO PICCOLO, ANTHONY EDWARD TARLENTINO, NICHOLAS NARDUCCI and LORENZO ORLANDO,

Appellants.

PER CURIAM:

The petition of the United States for rehearing en banc is granted as to James Santore, Joseph Lo Piccolo, Anthony Tarlentino, Nicholas Narducci, Peter Casella, Emilio D'Aria and James Massi, and is denied as to Lorenzo Orlando. Oral argument upon the rehearing en banc will be heard on March 16, 1960 at 10:15 A.M.

J. EDWARD LUMBARD
LEONARD P. MOORE
HENRY J. FRIENDLY
U.S.C.J.J.

9 March 1960

We dissent, having voted against en banc proceedings as not being in the interest of justice here.

CHARLES E. CLARK
S. R. WATERMAN